

**CHESAPEAKE BAY LOCAL ASSISTANCE BOARD'S
POLICY COMMITTEE MEETING - JULY 16, 2003
JAMES MONROE BLDG.
101 N. 14TH STREET, 17TH FLOOR CONFERENCE ROOM
RICHMOND, VIRGINIA 23219
MINUTES**

MEMBERS PRESENT:

Donald W. Davis
Colin D. Cowling
Stuart Mendelsohn

STAFF PRESENT:

C. Scott Crafton, Executive Director
Catherine Harold, Chief of Engineering
Shawn Smith, Principal Planner
Ali Baird, Special Projects Planner
Alex Adams, Environmental Scientist Planner
Brad Belo, Environmental Specialist

Mr. Davis called the meeting to order at 10:10 a.m. He called the roll, noting that there was quorum. He then introduced all the members.

Mr. Davis asked Mr. Crafton to make opening remarks. Mr. Crafton said that the items for discussion were the two documents that staff and the Ad Hoc Committee, formed by Secretary Murphy, regarding the Determination of Water Bodies with Perennial Flow, the Administrative Procedures for the Designation and Refinement of Chesapeake Bay Preservation Area Boundaries, and the definition of contiguous and adjacent.

Mr. Crafton explained that the group consisted of environmental and natural resources stake holders, members of the building industry, local governments and that Mr. Donald Davis had represented the Board. He noted that Mr. Russ Baxter facilitated the process. Mr. Crafton introduced Mr. Baxter.

Mr. Crafton went on to say that the 2nd issue under consideration was the Buffer Manual and that a number of people were interested in the manual and would be provided an opportunity to comment. He said that the Committee would be updated regarding comments that had already been received.

Mr. Baxter thanked everyone on behalf of Secretary Murphy for the invitation to be at the meeting. He said regarding the four issues that would be discussed, he wished to thank the committee and staff for providing a positive process. He noted that the issues needed to be worked out and because of the good faith, and technical expertise of the individuals involved, he believed that the documents represented a good product that would be

helpful not only to the Department but to local governments. He expressed an interest in hearing any comments that would be offered.

Mr. Baxter went on to note that if other issues came up in the future that the Secretary's Office was more than willing to provide assistance as was done in this instance. He again thanked staff, the members of the Ad Hoc Committee who were present and Mr. Crafton.

Mr. Davis recognized Ms. Catherine Harold to provide information on about the Committee consensus on Water Bodies with Perennial Flow, mapping requirements and definitions.

Ms. Harold provided a brief reference to the Regulations dated March 1, 2002 had language that indicated that there were areas that needed protection at or near the shoreline.

She said that Resource Protection Areas are comprised of "lands adjacent to water bodies with perennial flow. She said that these lands have an intrinsic water quality value due to the ecological and biological processes they perform.

Ms. Harold went on to provide information regarding the Secretary's Ad-hoc Committee noting that they had held two meetings and created two Guidance Documents: "Determinations of Water Bodies with Perennial Flow, and Administrative Procedures for the Designation and Refinement of Chesapeake Bay Preservation Area Boundaries.

She said the Committee was charged with addressing a number of issues. She noted the need to establish a method or protocol to determine whether water bodies had perennial flow and offered two suggestions. One was that these water bodies were depicted as perennial on the USGS maps, or the use of a scientifically valid system of in-field indicators of perennial flow.

Ms. Harold went on to explain that as part of the plan of development review process or the review of WQIA, localities are required to ensure or confirm the following. 1. A reliable site-specific evaluation is conducted to determine whether water bodies on or adjacent to the development site have perennial flow, and 2. RPA boundaries are adjusted as necessary on the site based on this evaluation.

Ms. Harold said that the Regulations did not have a definition of Perennial Flow and that the Committee decided that the definition should be a body of water that flows in a natural or man-made channel year-round during a year of normal precipitation. This includes, but is not limited to streams, estuaries, and tidal embayments and may include drainage ditches or channels constructed in wetlands or from former natural drainage ways that convey perennial flow. Lakes and ponds, through which a perennial stream flows, are a part of the perennial stream. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow.

Ms. Harold explained the Committee found 5 methods that prove a stream channel is perennial and that is when any of the following criteria is met. 1., Biological Indicators are present such as fish, crayfish, amphibians, mussels/clams or large multi-year tadpoles or benthic macroinvertebrates that require water for entire life cycles are present. These organisms include, but are not limited to Ephemeroptera (mayflies), Plecoptera (stoneflies) or Trichoptera (addisflies; or A numerical value plus or minus the threshold number of points determined to be perennial using an approved stream determination protocol, such as those referenced in the guidance document. The two listed were the North Carolina or Fairfax protocol.

Ms. Harold provided the following list of methods for determining perennial flow, 1. field indicator protocols, 2. ground water monitoring, 3. Surface water monitoring, 4. drainage area based sampling and 5. documented observation.

Ms. Harold briefly explained the field indicator protocols that are observations, evaluations of stream geomorphology, hydrology and biology. In the case of the North Carolina protocol, the North Carolina Division of Water Quality's version 2, Jan.'00 and draft inter policy dated January 16, 2003 indicated that if the score is plus or minus 30 points, then the stream is assumed perennial.

However, using the Fairfax County Method/Protocol dated May, 2003, Scores plus or minus 25 points indicate that a stream is perennial.

Ms. Harold said that field verification was recommended when the score is within 3 points of 30 (NC method) or 25 (Fairfax method) having documentation of other supportive data.

Ms. Harold encouraged localities to retest/refine the scoring and thresholds due to expected physiographic differences. These modifications should be reviewed and approved by CBLAD. She also said that it is okay for site-specific determinations, only for definitive maps where all streams are evaluated.

Ms. Harold provided a list of field protocol elements for geomorphology, and provided several in field pictures of examples of the hydrology elements.

Ms. Harold provided a list of field protocol elements for the biology aspect as well as an explanation for the use of a Piezometer. She said that stream flows could be determined by monitoring existing or new weir or flume, and calculating discharge using weir equations. She said that this method took both time and money. She noted that flow meters, collapsible flumes are generally unacceptable.

Ms. Harold went on to explain that the Ad Hoc Committee acknowledged that for smaller localities that may not have funding, surface water monitoring could be accomplished with pictures during different seasons, and the use of drainage area based sampling from similar watersheds and conditions found in watersheds that are nearby. She said that even though this method is not as absolute or precise, it is less costly and will provide

useful information even though there would be a loss of some streams. It is useful for site specific determination.

There was discussion about a recent pilot study in Fairfax County and Mr. Davis asked if Ms. Harold remembered the approximate percentage of land that had been added to the Resource Protected Area.

Ms. Salvati responded that she seemed to remember 30% of the streams became perennial.

Mr. Mendeolsohn commented that it wasn't quite doubling the total but it was a significant increase. He also said that the County is in the process of actively mapping every stream.

Ms. Harold continued her discussion about documented observations using photodocumentation that would be appropriate under some circumstances. She said that photo's needed to be accompanied with recent seasonal climate data, a date stamp for certification, at least 2 photo's clearly showing the channel up stream and down stream and in 200 foot increments, identifiable landmarks that could be verified and these photo's would be marked on the map. She advised not to go out sooner than 48 hours after a rainfall.

Ms. Harold further explained documented observations and the use of the Palmer Drought Index created in the '60s noting that a score of 4.0 or more is extremely wet and 4.0 or less being extremely dry or extreme drought. She also noted that the index is standardized for each area seen on the map of the United States.

She went on to discuss the Administrative Procedures Guidance Document dealt with the mapping, location and extent of RPA features. She said it recognized that the maps are intended to be general and for planning purposes and not a detailed boundary map unless the locality chose to make it one. She said that when a locality chooses to use just a general map, the guidance suggested that the locality have procedures to ensure that water bodies with perennial flow are identified and buffered. The guidance also has suggestions on what if you are outside the Ches Bay Preservation Areas and do not have water features. The guidance suggests when you might want to take a closer look at the science. She said the maps are not required to be updated every time there is a modification. The guidance encourages localities to have a working map that is accessible to the public.

She went on to discuss the site specific Ches Bay Maps saying they would be based on advanced surveys. Definitive maps would only depict upstream extent and not necessarily other RPA features. Enlargement or additions of features on the general map are considered to be a refinement of the boundaries and not a zoning map amendment so they should not require approval from either the local government or the Chesapeake Bay Local Assistance Board.

However, modifications to the definitive maps will need Board approval. She said that this would be considered a major modification by the locality.

Ms. Harold said that the guidance made reference to the Regulations section pertaining to mapping and the Plan of Development Review process when the locality is required to show whether water bodies do have perennial flow and they are required to make the necessary adjustments to the RPA boundaries. She noted that all the provisions of the Chesapeake Bay Preservation Act apply to all of the newly established RPA areas. She went on to note the following; localities are required to delineate RPA/RMA boundaries on plats and site plans, a notation needs to be made on plats requiring retention of an undisturbed and vegetated 100 foot buffer, denote buildable area on each lot during the plan of development review process, and building areas based upon performance criteria and set backs.

Ms. Harold advised that there was also guidance on grandfathering of previously platted or developed properties, developed or platted land falling within the newly-designated RPAs afforded administrative relief under Nonconforming Uses and Structure Guidance.

She said that the summary of the Screening Process described a list of questions that the localities would ask an applicant regarding features that are located within 100 yards of or on the property; is there a river, stream, creek, pond, lake, ditch, concentrated flow, spring with ground water discharge, wetlands. She noted that other sources that might determine whether another look should be taken are solid/dotted line on the USGS map on the property or within 500 feet, NWI mapped wetlands on property or within 100 yards, FEMA 100 year floodplain on property, or NRCS Soil Survey depict any streams or hydric soils on site or within 100 yards.

Ms. Harold said the last item that the ad hoc committee looked at was the term Contiguous and Connected. She said that Contiguous means touching a tidal wetland or water body with perennial flow, and Connected means by surface flow means through the ground inundation by water or ground is saturated to the surface.

Ms. Harold provided 4 scenarios to demonstrate the definitions.

Mr. Davis asked if there were any questions. Mr. Cowling asked if there had been any member of the ad hoc committee representing agriculture. Mr. Baxter responded that there was no one from the agricultural community.

Mr. Cowling commented that the Fairfax definition included various species to infer perennality and noted that many of the same species are present around impounded water including poultry and hog waste ponds which under sever penalty of law could not be perennial. He suggested that the species section of the Fairfax definition should be deleted resulting in a more locally adaptable definition.

Mr. Cowling went on to explain his concerns as the guidance related to the farming community. His concerns were directed at ditches and the appearance that the guidance

would require a 100 foot buffer around them. Mr. Cowling explained how farmers manage their property, what could be expected from the soils and the ground water table on the Eastern Shore and how inappropriate it was to have guidance that would force farmers to maintain a 100 foot buffer on their property around ditches. Mr. Cowling also quoted a sentence in the Regulations where it is indicated that vegetation in the 100-foot buffer must be preserved if present and re-established where it does not exist. He went on to say that he believed a member of the farm community should be asked to provide input into the guidance that is in the best interest of the farmer.

Mr. Baxter agreed that the issue needed to be addressed and said that someone would be asked to review the guidance by a member of the state's farm bureau.

Mr. Davis called for public comment and recognized Mr. Patrick O'Hare. Mr. Hare said that he was a member of the ad hoc committee and participated on behalf of home builders association. He advised at both meetings that he attended, Mr. Cowling's concerns had been addressed by a member from the Chesapeake area, and at both meetings issues were discussed about the maintenance of ditches, about whether a 100 foot buffer was required for a road side ditch, but for some reason the issue was not focused on and therefore it was not addressed in the guidance. He said that the gentleman who brought the issue up in the Ad Hoc Committee meetings believed it to be a real issue. He went on to confirm what Mr. Cowling had stated about the water table being high, so much land in cultivation, the water stays in the ditches and under the definition would be considered perennial and all the rules would apply to it.

He went on to say that he had submitted comments on behalf of the Home Builders Association and many of them were adopted. One was not adopted and that one is approval of the Board for deviation from the protocols. He said the program was about more than administrative expedience, and stated that he was a part of the original program, noting that in the beginning it was difficult to get the programs up and running and most localities were kicking and screaming over the unfunded mandate. He said that time has changed and localities have come to like the program but not for what it was intended for. He said that localities are now using the program to limit growth because that is their political philosophy within the community. He said the program was never about that and he was concerned that people who want to adjust the protocols will use it for that purpose and use it to implement their political agenda when the whole purpose had been and should still be water quality. He said one way to ensure that the protocols are amended appropriately would be that the proposed modifications be brought to the Board and not to the Department. He directed everyone's attention to a comment on the first page, second paragraph that says the methods presented in the guidance reflect various options that are approved by the Chesapeake Bay Local Assistance Department. He suggested that there would be much more clout if the options were approved by the Board.

His final comment regarding the ditching issue, particularly in the Tidewater area, revealed that a number of individuals are requesting continual help on the ditching issue. He said that local governments are using storm water ditches or agricultural ditches to

control the way a development can be followed in the areas of density, the location to the roads, and there is a need to take another look.

Mr. Crafton asked if he understood correctly that localities are using the Bay Act specifically to do these things. Mr. O'Hare responded yes. Mr. O'Hare commented that he had not received information to review regarding Ms. Harold's drawings of the four scenerios explaining Contiguous and Connected. Mr. Crafton stated that he was correct and the reason that this information has not gone to the Ad Hoc Committee was due to a turnover in staff. Mr. O'Hare said that was fine.

Mr. Davis asked what kind of time table members were looking at to get the information out. Mr. Crafton said the information would be coming out in the fall. Mr. Davis asked if he understood that the presentation was for information only. Mr. Baxter responded that was correct and that there would be more changes.

Mr. Davis called for the next speaker, Mr. Chuck Lincoln. He said that others had expressed his concerns about the two documents that Ms. Harold had presented but he did have comments regarding the buffer document. Mr. Davis responded that he would have an opportunity to express those later.

Mr. Davis recognized Ms. Joan Salvati from Chesterfield County. Ms. Salvati advised that she had also served on the Ad Hoc Committee and complimented Mr. Baxter for his ability to lead the group. She said that her comments were directed at the field indicator protocols. She said that she and staff had an opportunity to take the worksheet into the field and what came out of that was that the confirmation that this is a very new science in evaluating streams and there is an awful lot of professional judgment that needed to be exercised. The field sheets are not quantitative but qualitative. There are a lot of precise observations but the scoring is indicated by the use of the terms such as; absent, weak, strong and perhaps a moderate. She said that based on these facts, and she could not suggest strongly enough that these protocols be tested in whatever locality that they were to be used. She said that whoever uses this protocol must be trained, and could not suggest strongly enough that these protocols be tested in whatever locality that they are to be used. She said that given the fact that the science evolves, she strongly recommended that the Board monitor the implementation of the protocols.

Mr. Davis asked Ms. Salvati what problems she thought a small locality would have that didn't have the expertise Chesterfield County had. Ms. Salvati responded that it would be an issue and would hope that there would be a certification program. She said it did not need to be formal but there is a need for training. She said that Chesterfield has a list of qualified experts who do field determinations and delineate RPA boundaries. She said that if she was a small locality, she would have a list of trained experts in stream methodology.

Mr. Baxter commented that Ms. Salvati's findings were one of the reasons that a single method was not chosen for determining perennality.

Mr. Cowling went on to say that roadside ditches would be exempt but ditches that lead water away from the roads generally go across private property, often farmer's fields, and these do not appear to be exempt. He said that if they are not maintained, the result would be highway flooding. He said that if these drainage system ditches were declared perennial, the Regulations would require the re-establishment of a buffer making access and therefore maintenance impossible. He said that ditches that stay full of water all the time, without maintenance, could cause serious health problems.

Mr. Cowling commented that in some communities, which unfortunately tend to be low income, are already prone to flooding, the guidance would only compound their problems.

Mr. Baxter stated that these issue would definitely be taken into consideration. Mr. Mendelsohn asked if the issue had been reviewed. Mr. Baxter so no. Mr. Crafton said that at the very least this should be reviewed, and Mr. Davis agreed, pointing out that the way it was written could be interpreted that there should be buffers around all ditches. Mr. Mendelsohn expressed concerned about being able to redirect for stream restoration.

Mr. Davis recognized Ms. Claudia Cotton, representing the Tidewater Builders, who stated that she echoed Mr. O'Hare's comments. She said that she was deeply concerned about the ditches because the truth was that creatures that inhibit perennial streams also inhabit roadside ditches.

Mr. Davis recognized Mr. Phil Abraham, Virginia Home Builders Association, who expressed his concern regarding the buffer issue, and the fact that staff did not seek representation. He said that he believed that the problems with the buffer document have arisen because of lack of representation. He went on to state that he believed that the Board should be the approving authority and fully agreed with Mr. O'Hare's comments that the Board should be the approving authority. He stated that he was deeply concerned over issues in the buffer document that were not supported by the Regulations.

Mr. Mendelsohn thanked him for the obvious confidence that was held in Board.

Mr. Davis recognized Mr. Joe Lerch, Chesapeake Bay Foundation who expressed appreciation for the good work by Mr. Baxter and staff.

Mr. Davis recognized Mr. Mike Toalson, Virginia Home Builders Association, who commented that although these issues involve revolving science, local governments are still using the Act, and will use guidance, to apply to land already approved. He expressed deep concern about the significant impacts on development. He suggested that there needed to be care given to providing that localities are not provided with the right to abuse the authority granting them. He went on to compliment Mr. Baxter and others present on their work to provide fair information.

Mr. Crafton commented that there are properties that have been grandfathered. Mr. Crafton recognized that there could be issues if the properties had been zoned and not platted.

Mr. Toalson commented that the new information suggested that grandfathering applies to even lands that have already been zoned, and that having these lots platted is not the major concern. He said that another concern was the amount of acreage that had been zoned, and that he was not talking about a lot, but hundreds of acres.

Mr. Mendelsohn commented that he was concerned about there being significantly more land impacted and as importantly, the issue of property rights. He went on to suggest that the Board be sensitive to these issues.

Mr. Davis suggested that the Board consider keeping an Ad Hoc Committee together at all times. Mr. Crafton agreed and suggested an Ad Hoc Stakeholder Committee as well.

Mr. Cowling commented that he agreed with Mr. Mendelsohn, and speaking of property rights, the 4th Amendment to the Constitution was in the back of his mind. He said that it appeared that the Amendment was being pushed to the limit.

Mr. Davis recognized Mr. Darryl Cook, James City County, who also served on the committee. Mr. Cook commented that Mr. Baxter did a great job. He went on to say that his comments would be the same as Ms. Salvati. He shared that when they adopted the North Carolina protocol that the field determination threshold was lower by several points. He said that he could not suggest strongly enough that localities determine what their threshold is. He also cautioned of using just the number 25 or 30.

Mr. Davis recognized Mr. Steve Hubble who agreed with Ms. Salvati that training is an absolute must.

Mr. Davis recognized Mr. David Kovacs who reminded everyone that the Virginia constitution requires the protection of Virginia waters, and protecting it was not an easy task.

Mr. Davis recognized Mr. Mike Toalson, Home Builders Association, who expressed concern that the agency was changing the rules in the middle of the game. He went on to say that providing guidance to people is the same as providing regulations and in this case, the rules of changed. Mr. Toalson also expressed concern that localities would be making judgments with guidance that were not appropriate.

Mr. Davis closed the public comment period.

Mr. Davis thanked Mr. Baxter and praised him for the good work, and in turn, Mr. Baxter thanked Department staff.

Mr. Crafton commented that he would be in touch with the Virginia Farm Bureau for comments. Mr. Baxter agreed.

Mr. Mendelsohn commented that the document need more clarification, and the ditching issue and is not ready for approval. Mr. Davis agreed. Mr. Mendelsohn did not want to delay approval much past the September 15, 2003 Board meeting.

Mr. Davis called for discussion on Draft Riparian Buffers Guidance Manual and recognized Mr. Scott Crafton for opening comments.

Mr. Crafton stated that the buffer manual issue was a train wreck. He said that the manual had been sprung on the Board under the assumption that there had been greater representation. He said because of his work load, he did not review it, and at the time it was presented to the Board they had not had an opportunity to review it.

Mr. Crafton said that he personally felt the same kind of concern that has been expressed by many and pledged that document would not say any more than Regulations say.

Mr. Crafton went on to say that the plan is to revise the document and had been told that staff could expect approval of their request for an extension until the end of the year.

He said that he hoped to be able to bring the manual to policy committee in August.

Mr. Davis called for public comments.

Mr. O'Hare commented that he had submitted his comments on behalf of the Virginia Home Builders. He said that it was refreshing to hear how the manual had been developed, unfortunately, it was government turned upside down. He went on to state that the only thing localities wanted to be able to say was that CBLAD said so, and that inaccurate guidance should not be passed on to these people.

Mr. Toalson commented that he accepted in good faith Mr. Crafton's comments about take the fault, however, he respectfully requested that the Home Builders Association be provided with the opportunity to review the document before the August meeting of the policy committee.

Having established that everyone present had submitted comments in writing, Mr. Davis asked if there were any further public comments. There were none.

Mr. Mendelsohn asked when the comments to the buffer document would be completed. Ms. Baird advised hopefully the end of the week or first of the next week.

Mr. Cowling commented that he appreciated that more time was being given to the preparation of the manual, and Mr. Davis commented that he was concerned that localities would including the misinformation in their ordinances.

Mr. Davis, Mr. Crafton discussed canceling the August 4th meeting of the Board and rescheduling a Policy Committee meeting for Tuesday, August 26, 2003 at 10:00 in the agency conference room.

Mr. Davis reminded everyone that the Northern and Southern Area Review Committees would meet on August 12, 2003 at their respective times. Mr. Davis suggested that new committee members would be assigned at that time.

Mr. Davis called for a motion to adjourn the meeting. Mr. Cowling motioned, Mr. Mendelsoh, seconded. The meeting was adjourned at 12.20p.m.